PD-1039-20

PD-1039-20 COURT OF CRIMINAL APPEALS AUSTIN, TEXAS Transmitted 10/29/2020 10:36 AM Accepted 10/29/2020 11:25 AM DEANA WILLIAMSON CLERK

No.			

In the

Court of Criminal Appeals of Texas

At Austin

FILED COURT OF CRIMINAL APPEALS 10/29/2020 DEANA WILLIAMSON, CLERK

On Petition for Discretionary Review from Appeal No. 01-18-00139-CR In the First Court of Appeals

No. 1412036-A

_____**_**___

In the 176th District Court of Harris County, Texas

EX PARTE OSCAR MINJARE SANCHEZ, JR.

Appellant

V.

THE STATE OF TEXAS

Appellee

STATE'S PETITION FOR DISCRETIONARY REVIEW

•

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ORAL ARGUMENT NOT REQUESTED

IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

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Presiding Judge:

Hon. Stacey Bond 176th District Court of Harris County, Texas

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TO THE HONORABLE COURT OF APPEALS: STATEMENT REGARDING ORAL ARGUMENT

The State waives oral argument pursuant to TEX. R. APP. P. 39.1.

STATEMENT OF THE CASE

Appellant was charged with the felony offense of failing to stop and render aid (CR 15). Appellant entered a plea of not guilty, and the case proceeded to jury trial (CR 67). The jury found appellant guilty of the charged offense and assessed a ten-year probated sentence (CR 67). The court certified appellant's right to appeal, and appellant filed a timely notice of appeal (CR 73, 75).

STATEMENT OF PROCEDURAL HISTORY

The appellate court affirmed appellant's conviction in Cause No. 01-16-00293-CR and subsequently issued a mandate. Appellant then filed a writ of habeas corpus alleging that his trial counsel had provided ineffective assistance of counsel at trial due to his failure to call witnesses to testify. Appellant's writ was denied by the habeas court (CR 25). The habeas court certified appellant's right of appeal and appellant filed a timely notice of appeal (CR 44-45). The appellate court issued an opinion on December 18, 2018, affirming the habeas court's denial of the writ. Appellant's motion for rehearing was denied by operation of law but the en banc Court granted rehearing. After rehearing this matter, the appellate court withdrew its original opinion, vacated its judgment, declined to adopt the habeas judge's findings of fact and conclusions of

law, reversed the habeas court's denial of relief and remanded the case for proceedings consistent with its opinion. *See Ex Parte Sanchez, Jr.*, No. 01-18-00139-CR, 2020 WL 1522817 (Tex. App.—Houston [1st Dist.] March 31, 2020, no pet. h.). The State's petition for discretionary review is due November 12, 2020.

GROUNDS FOR REVIEW

1. Did the First Court of Appeals err by acting as factfinder in appellant's 11.072 habeas proceeding? Unlike the Court of Criminal Appeals in an Article 11.07 writ, the 1st Court of Appeals' role in an Article 11.072 writ is purely that of an appellate court. Consequently, the question before the appellate court was not whether to accept or reject the trial court's findings, but whether the trial court abused its discretion in denying relief.

REASONS FOR REVIEW

This Court should grant the State's petition for discretionary review because the intermediate appellate court erroneously acted as factfinder in appellant's appeal from the habeas court's denial of his writ of habeas corpus. In doing so, the appellate court both overstepped its authority and failed to determine whether the habeas court abused its discretion in denying relief. This Court should grant review to clarify that intermediate appellate courts are not vested with the authority to act as factfinders when reviewing an appeal from an 11.072 habeas proceeding.

ARGUMENT AND AUTHORITIES

The appellate court erred by declining to rule on the legal question before it—whether the habeas court abused its discretion in determining that trial counsel was

not constitutionally ineffective—and by remanding the case for further factual development. In doing so, the appellate court relied upon Article 11.07 habeas case law from the Court of Criminal Appeals. Tex. Code Crim. Proc. Ann. Art. 11.07. In Article 11.07 writs, the Court of Criminal Appeals is the ultimate finder of fact. Exparte Garcia, 353 S.W.3d 785, 787-88 (Tex. Crim. App. 2011) citing Exparte Reed, 271 S.W.3d 698, 727-28 (Tex. Crim. App. 2008). This is because the Texas constitution vests the Court of Criminal Appeals with authority to ascertain matters of fact in writ proceedings and the Texas Code of Criminal Procedure empowers the Court to grant writs of habeas corpus. Tex. Const. Art. V §5; Tex. Code Crim. Proc. Art. 11.05. While the Court of Criminal Appeals usually defers to the trial court's findings of fact in Article 11.07 writs, as the ultimate fact finder, it has the power to make findings and conclusions that the record supports. Exparte Garcia, 353 S.W.3d at 787-88.

By contrast, intermediate appellate courts do not have the ability to act as fact finders in 11.072 writ proceedings. *See* TEX. CODE CRIM. PROC. ANN. Art. 11.072; *see also Ex parte Torres*, 483 S.W.3d 35, 42 (Tex. Crim. App. 2016) (in article 11.072 habeas proceedings the trial judge is the sole finder of fact). Consequently, an intermediate court's only role in 11.072 appeals is to act as an appellate court. *See Ex parte Garcia*, 353 S.W.3d at 788 (intermediate courts of appeals are truly appellate courts in the article 11.072 context). For this reason, intermediate appellate courts do not have the authority to ascertain matters of fact in writ proceedings. *See State v. Guerrero*, 400 S.W.3d 576,

583 (Tex. Crim. App. 2013) (in a post-conviction writ application filed pursuant to Article 11.072, the trial judge is the sole finder of fact). Also, unlike the Court of Criminal Appeals, intermediate appellate courts are not vested with the power to grant habeas corpus relief. *See* Tex. Code Crim. Proc. Art. 11.05.

In addition to incorrectly applying Court of Criminal Appeals 11.07 precedent, the intermediate appellate court also cited *Ex parte Zantos-Cuebas* in support of its decision to remand appellant's case for further fact finding. 429 S.W.3d 83 (Tex. App.—Houston [1st Dist.] 2014, no pet.). While *Ex parte Zantos-Ceubas* does involve an 11.072 writ that was remanded for fact finding by an intermediate appellate court, in that case—unlike appellant's—no findings of fact had been made at the time the Court remanded for factual findings. *See Id.* at 88 ("In this case, the trial court entered a written order denying the application as frivolous and did not enter written findings of fact or conclusions of law."). The appellate court in *Ex parte Zantos-Cuebas* remanded the case for a first round of findings; not a second round of findings. Consequently, this case does not support the appellate court's decision to remand for a second round of findings.

In summary, unlike the Court of Criminal Appeals in an Article 11.07 writ, an intermediate appellate court's role in an appeal from an 11.072 writ is solely that of an appellate court. Given that the appellate court is not the finder of fact in an 11.072 writ, the appellate court erred by declining to adopt the habeas judge's findings of fact

and conclusions of law. The State can find no precedent for an intermediate court framing its appellate review of an 11.072 case in terms of whether to adopt the habeas court's findings. This lack of precedent is further indication that the appellate court's sole role in this case was to determine whether the habeas court abused its discretion by denying appellant's ineffective assistance of counsel claim. *See Riley v. State*, 378 S.W.3d 453, 457-58 (Tex. Crim. App. 2012) *overruled on other grounds by Miller v. State*, 548 S.W.3d 497 (Tex. Crim. App. 2018) (because claims of ineffective assistance of counsel involve mixed questions of law and fact an appellate court should apply an abuse of discretion standard on appeal).

To prevail on his ineffective-assistance claim, appellant was required to provide an appellate record that demonstrates that his counsel's performance was not based on sound strategy. See Thompson v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (holding that record must affirmatively demonstrate alleged ineffectiveness). The appellate court in this case has already acknowledged that the record contains "no information about trial strategy." Ex Parte Sanchez, Jr., 2020 WL 1522817 at *20. When the record is silent regarding trial strategy, a defendant is only entitled to relief if he can show that no reasonable attorney could have made the trial decisions that were made. Weaver v. State, 265 S.W.3d 523, 538 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). By acknowledging that, "there may be reasonable trial strategies that counsel against putting into evidence even helpful testimony" the appellate court has already conceded

that appellant failed to meet this burden to show that his trial counsel's decision not to call certain witnesses constituted ineffective assistance of counsel. *Ex Parte Sanchez, Jr.*, 2020 WL 1522817 at *17. This conclusion requires the appellate court to affirm the habeas court's denial of relief. *See Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Consequently, the State requests that this Court grant its petition for discretionary review.

PRAYER FOR RELIEF

The State prays that this Court will grant the State's grounds for discretionary review and reverse the appellate court's opinion.

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/s/ Chris Conrad

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies in compliance with Texas Rule of Appellate Procedure 9.4(i)(3) that the foregoing petition for discretion review contains 2,169 words, as represented by the word-processing program used to create the document. This document complies with the typeface requirements in Rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in a 12-point typeface.

/s/ Chris Conrad

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been submitted for service by e-filing to the following address:

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Date: 10/28/2020

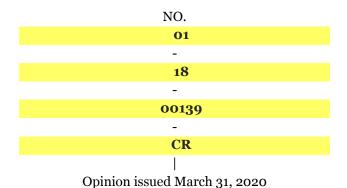
No
In the
Court of Criminal Appeals of Texas
At Austin
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EX PARTE OSCAR MINJARE SANCHEZ, JR.
Appellant
V.
THE STATE OF TEXAS
Appellee
—————————————————————————————————————
On Petition for Discretionary Review from
Appeal No. 01-18-00139-CR
In the First Court of Appeals
The title 1 live source of 1 ppends
Trial Court Cause No. 1412036-A
176 TH District Court, Harris County, TX
Hon. Nikita Harmon, Presiding
————•————
APPENDIX
<u> </u>
Opinion (March 31, 2020)

2020 WL 1522817 Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas, Houston (1st Dist.).

EX PARTE Oscar Minjare SANCHEZ, Jr.



Synopsis

Background: Defendant, convicted of failure to stop and render aid and sentenced to ten years' community supervision, filed post-conviction application for writ of habeas corpus. The 176th District Court, Harris County, No. 1412036-A, denied the habeas application without evidentiary hearing. Defendant appealed.

Holdings: The Court of Appeals, en banc, Landau, J., held that:

- [1] it had jurisdiction to review trial court's denial of defendant's habeas application;
- [2] defendant failed to show that passenger in vehicle who was a police captain would have been available to testify at trial;
- [3] passenger in defendant's vehicle who was sitting behind defendant would have been available to testify and her testimony would have been of some benefit to defense;
- [4] counsel's failure to call passenger to testify at trial prejudiced defendant;

- [5] it was unknown whether defendant could have established deficient performance for counsel's failure to call passenger to testify; and
- [6] trial court's findings of fact and conclusions of law were not supported by record.

Reversed and remanded.

Keyes, J., filed dissenting opinion in which Lloyd, J., and Radack, C.J., joined.

West Headnotes (24)

[1] Habeas Corpus 🐎 Decisions reviewable

Court of Appeals had jurisdiction to review trial court's denial of defendant's post-conviction application for writ of habeas corpus, where defendant challenged validity of conviction which placed him on community supervision for ten-year period. Tex. Crim. Proc. Code Ann. art. 11.072 § 2(b).

[2] Habeas Corpus 🐎 Discretion of lower court

Generally, an appellate court reviews a trial court's decision to grant or deny habeas corpus relief for an abuse of discretion.

[3] Habeas Corpus - Presumptions and burden of proof

In reviewing a trial court's decision to grant or deny habeas corpus relief, Court of Appeals views the evidence in the light most favorable to the trial court's ruling.

[4] Habeas Corpus ← Scope and Standards of Review

In reviewing a trial court's decision to grant or deny habeas corpus relief, Court of Appeals will uphold the habeas court's judgment as long as it is correct under any theory of law applicable to the case.

[5] Habeas Corpus 🐎 Review de novo

In reviewing a trial court's decision to grant or deny habeas corpus relief, if the habeas judge was not the trial judge and there was no evidentiary hearing, the judge is not in an appreciably better position than the reviewing court to resolve the matter; thus, a de novo review is appropriate.

[6] Criminal Law Puestions of Fact and Findings

Court of Appeals affords deference to the trial court's determination of historical facts supported by the record.

[7] **Criminal Law** • Questions of Fact and Findings

If the trial court's findings of fact are not supported by the record, then Court of Appeals may reject its findings.

[8] Criminal Law - Conduct of trial in general

On review of an ineffective assistance of counsel claim, Court of Appeals indulges a presumption that counsel's conduct fell within the range of reasonable professional assistance, and thus, the appellant must overcome the presumption that the challenged action constituted sound trial strategy. U.S. Const. Amend. 6.

[9] Criminal Law 🕪 Effective assistance

On review of an ineffective assistance of counsel claim, Court of Appeals' review is highly deferential to counsel, and the Court does not speculate on counsel's trial strategy. U.S. Const. Amend. 6.

[10] Criminal Law - Conduct of Trial in General

Criminal Law ← Strategy and tactics in general

To prevail on an ineffective-assistance claim, the appellant must provide an appellate record that demonstrates that counsel's performance was not based on sound strategy. U.S. Const. Amend. 6.

[11] Criminal Law Standard of Effective Assistance in General

Criminal Law Preparation for trial

A defendant in a criminal case is entitled to reasonably effective assistance of counsel, including investigation of the defendant's case. U.S. Const. Amend. 6.

[12] Criminal Law Investigating, locating, and interviewing witnesses or others

For purposes of reasonably effective assistance of counsel, part of counsel's duty to investigate defendant's case is counsel's responsibility to seek out and interview potential witnesses. U.S. Const. Amend. 6.

[13] Criminal Law Presentation of witnesses

To show ineffective assistance of counsel based on an uncalled witness, an appellant must show two things: (1) the witness would have been available to testify; and (2) the witness's testimony would have been of some benefit to the defense. U.S. Const. Amend. 6.

[14] Criminal Law Presentation of witnesses

To meet the availability requirement for showing ineffective assistance of counsel based on an uncalled witness, proposed witnesses must testify or swear in an affidavit that they were available to testify at the defendant's trial. U.S. Const. Amend. 6.

[15] Criminal Law Presentation of witnesses

An ineffectiveness claim based on the failure to call witnesses may be established through either testimony on the record or an affidavit from the uncalled witness. U.S. Const. Amend. 6.

[16] Habeas Corpus ← Review de novo Habeas Corpus ← Questions of law and fact

On review of an ineffective assistance of counsel claim in an application for writ of habeas corpus, while Court of Appeals defers to any underlying historical fact determinations made by the habeas court, the Court reviews the ultimate question of prejudice de novo. U.S. Const. Amend. 6.

[17] Criminal Law Presentation of witnesses

Defendant failed to show that passenger in his vehicle, who was a police captain, would have been available to testify at his trial for failure to stop and render aid, as element of ineffective assistance of counsel claim based on uncalled witness; passenger's affidavit did not discuss whether he would have been available to testify. U.S. Const. Amend. 6.

[18] Criminal Law Presentation of witnesses

Passenger in defendant's vehicle who was sitting behind defendant would have been available to testify and her testimony would have been of some benefit to defense, as element of ineffective assistance of counsel claim based on uncalled witness, at trial for failure to stop and render aid; passenger stated in affidavit that she would have gladly testified at defendant's trial if she had been asked, and State's witnesses testified that other passengers' recollection of accident was consistent with State's theory that defendant struck lieutenant's vehicle, but passenger's affidavit conveyed opposite, that there was no impact that anyone observed, which would have would have bolstered defendant's trial theory. U.S. Const. Amend. 6.

[19] Criminal Law Presentation of witnesses

Trial counsel's failure to call passenger in defendant's vehicle to testify at trial for failure

to stop and render aid prejudiced defendant, as element of ineffective assistance of counsel claim based on uncalled witness; evidence against defendant was not overwhelming, defendant's defense was that there was no collision or if there was, it was so minor that he was unaware of it, and an exculpatory eyewitness whose testimony corroborated defendant's defense that there was no accident likely would have made impact on jury. U.S. Const. Amend. 6.

[20] Automobiles • Neglect of duty after accident

The elements of the offense of failure to stop and render aid are that the defendant (1) is the driver of a vehicle; (2) involved in an accident; (3) causing injury or death of any person; (4) and the driver intentionally or knowingly; (5) fails to stop and render assistance. Tex. Transp. Code Ann. § 550.021(c).

[21] Criminal Law - Conduct of Trial in General

It was unknown whether defendant asserting ineffective assistance of counsel could have established deficient performance for counsel's failure to call passenger in defendant's vehicle to testify at trial for failure to stop and render aid, where, because State did not respond to defendant's habeas petition with insight into trial counsel's strategy and habeas court refused evidentiary hearing, Court of Appeals had no information about trial strategy. U.S. Const. Amend. 6.

[22] Criminal Law Presentation of witnesses

Even when an uncalled witness is available and his unoffered testimony would have likely benefited the defense, it still may be that defense counsel's representation was not deficient, for purposes of ineffective assistance of counsel claim; this is because there may be reasonable trial strategies that counsel against putting into evidence even helpful testimony. U.S. Const. Amend. 6.

[23] Habeas Corpus - Adequacy and effectiveness

Trial court's findings of fact and conclusions of law in its order denying evidentiary hearing and denying defendant's application for habeas relief on basis that defendant did not establish ineffective assistance of counsel were not supported by record, at hearing on defendant's application for writ of habeas corpus; defendant showed that passenger in vehicle was available to testify and that testimony would have benefited case, and trial counsel's failure to call passenger to testify prejudiced him. U.S. Const. Amend. 6.

[24] Habeas Corpus ← Counsel Habeas Corpus ← Counsel

The habeas process does not require a habeas applicant asserting ineffective assistance of counsel claim to elicit an affidavit from trial counsel admitting deficient performance before the State is compelled to respond or any evidentiary hearing is granted to avoid having a denial of an application insulated from meaningful review. U.S. Const. Amend. 6.

On Appeal from the 176th District Court, Harris County, Texas, Trial Court Cause No. 1412036-A

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Panel consisted of Justices Keyes, Massengale, and Brown.

OPINION ON EN BANC RECONSIDERATION

Sarah Beth Landau, Justice

*1 We granted Oscar Minjare Sanchez, Jr.'s motion for en banc reconsideration and withdrew the opinion and judgment issued December 20, 2018. We issue this en banc opinion and judgment in their stead. Sanchez appealed from the denial of his post-conviction application for a writ of habeas corpus filed under Texas Code of Criminal Procedure art. 11.072. Sanchez, in his sole issue, contended that his trial counsel rendered ineffective assistance by failing to call exculpatory witnesses during the guilt/innocence phase of his trial. Because the habeas court's findings of fact and conclusions of law that it made in denying Sanchez a hearing on his writ are unsupported by the record, we reverse and remand for further proceedings consistent with this opinion.

BACKGROUND¹

Sanchez was the designated driver for his four passengers on a night out celebrating a friend's birthday at two bars. After closing time, he was driving the group home in his Ford F-250 on Highway 249 when a police chase appeared in front of him. An unmarked police car, a Chevy Impala driven by Harris County Sheriff's Office Lieutenant G. Goudeau, suddenly moved in front of him, causing Sanchez to swerve left to try to avoid an accident.

According to one officer who observed the Ford F-250 and the Impala from his rear-view mirror while driving 100 miles an hour and participating in a police chase, the front of Sanchez's truck collided with the back of Lieutenant Goudeau's Impala. The officer saw the rear of the Impala go up in the air before it struck the curb and spun into a nearby parking lot.

Sanchez continued home without stopping. After Lieutenant Goudeau radioed for help, Sergeant K. Benoit, who was following the chase vehicles and testified that he had seen the accident, returned to the scene, and saw that Goudeau was injured. Benoit waited with Goudeau until an ambulance transported her to the hospital, where she stayed for four days to treat severe injuries.

After hearing about the accident on the news the next morning, Tomball Police Department Captain R. Grassi, who was a passenger in the car with Sanchez, called the captain of the Harris County Sheriff's Office to share information about the incident. Sanchez was with him.

Sanchez told Deputy A. Marines that a dark-colored Impala had suddenly darted into his lane on the Highway 249 feeder

road and that he hit his brakes, swerved, and entered the middle lane to avoid hitting it. Sanchez did not know where the Impala went after it entered his lane. Sanchez cooperated and answered Deputy Marines's questions and allowed him to examine the Ford F-250 twice. Deputy Marines testified that it was rare for someone to come forward and cooperate as Sanchez did.

Although Goudeau's vehicle sustained serious damage, investigation revealed only minor cosmetic damage to Sanchez's truck. Photos depicted a faint scuff mark on the bumper between the fog lamp and the tail ring, a crack on the right side of the grill, a dark plastic piece embedded in the tread of a tire, and a scuff mark on the undercarriage. The first time he inspected the truck, Marines did not see it, but the second time he returned to Sanchez's truck, he saw a bit of gray metallic paint that appeared to match the Impala but not the silver paint on Sanchez's F-250. Chemical analysis revealed that the paint could have come from Goudeau's Impala or any other vehicle with similar paint characteristics. An unknown number of vehicles have a similar paint profile.

*2 Sanchez was charged with the third-degree felony offense of failure to stop and render aid. A jury convicted him in 2016. *See Sanchez v. State*, No. 01-16-00293-CR, 2017 WL 1424949, at *1 (Tex. App.—Houston [1st Dist.] Apr. 20, 2017, pet. ref'd) (mem. op., not designated for publication). The State did not call any of the passengers in Sanchez's car as witnesses. The defense did not put on any witnesses.

The trial court assessed Sanchez's punishment at 10 years' confinement but probated the sentence by placing him on 10 years' community supervision, with 30 days' confinement in the Harris County Jail as a condition of probation. *See id.* This Court affirmed Sanchez's conviction in 2017, in which he raised two issues, that the trial court erred in submitting a voluntary-intoxication charge to the jury and that the evidence was insufficient because it failed to show that he knowingly left the accident. *See id.* The Court of Criminal Appeals refused Sanchez's petition for discretionary review, and this Court's mandate issued.

In 2017, Sanchez applied for a writ of habeas corpus under Texas Code of Criminal Procedure article 11.072 and requested a hearing. In his application, Sanchez alleged that his trial counsel had provided ineffective assistance by failing to call necessary exculpatory witnesses. Sanchez claimed that his trial counsel should have called three of the four passengers in his truck, Captain R. Grassi, S. Martin, and B.

Flores, to testify. These three witnesses provided affidavits, attached to Sanchez's application, stating that they were passengers in his truck, they saw him swerve around the car that darted out in front of them, and they were unaware of a collision. The State did not respond to Sanchez's application.

In 2018, the habeas judge, who was not the judge who had presided over the trial, signed an order denying Sanchez's habeas application without an evidentiary hearing. Sanchez timely filed notice of appeal and the habeas court certified that Sanchez had a right of appeal. Because the habeas court's order did not deny Sanchez's habeas application as frivolous and the clerk's record did not include the required findings of fact and conclusions of law, this Court abated the appeal. *See* Tex. Code Crim. Proc. art. 11.072, § 7(a).

The Habeas Court's Findings of Fact and Conclusions of Law

In response to the order abating the appeal, the trial court filed a supplemental clerk's record, which included the habeas court's findings of fact and conclusions of law. The pertinent findings of fact and conclusions of law, proposed by the State and signed by the habeas court, are:

FINDINGS OF FACT

•••

- 5. The applicant claims trial counsel failed to present evidence from Captain [R.] Grassi, [S.] Martin, and [B.] Flores during the applicant's trial.
- 6. The applicant claims that these witnesses would have testified that they were passengers in the applicant's vehicle and that they were not aware of the applicant's vehicle colliding with the complainant's vehicle.
- 7. The trial court finds that trial counsel did not call any witnesses in his case-in-chief during the guilt[/]innocence phase of the applicant's trial.
- 8. The trial court finds, based on the reporter's record, that trial counsel's cross[-]examination of Deputy [R.] Musil elicited testimony that Grassi, Martin, and Flores all made consistent statements to law enforcement about what happened....

*3

•••

- 11. The trial court finds that the applicant fails to show that trial counsel was deficient.
- 12. The trial court finds that the applicant fails to establish a reasonable probability that the result of the proceeding would have been different had these witnesses been called to testify at the applicant's trial.

CONCLUSIONS OF LAW

...

3. The applicant fails to show that Grassi, Martin, and Flores were available and that their testimony would have benefited the defense. *See King v. State*, 649 S.W.2d 42 (Tex. Crim. App. 1983); [*EJx parte Flores*, 387 S.W.3d 626, 638 (Tex. Crim. App. 2012) (the applicant must still show that "some benefit" establishes a reasonable probability that the result of the proceeding would have been different, i.e., one sufficient to undermine confidence in the outcome).

....

5. In all things, the applicant has failed to demonstrate that he was denied the effective assistance of counsel.

Accordingly, the instant application is **DENIED**.

After this Court reinstated the case and requested briefing, both Sanchez and the State filed briefs, and Sanchez filed a reply. *See* Tex. R. App. P. 31.1.

DISCUSSION

A. Standard of review

[1] Under Article 11.072, when a person applies for habeas corpus relief, "the applicant must be, or have been, on community supervision, and the application must challenge the legal validity of: (1) the conviction for which or order in which community supervision was imposed; or (2) the conditions of community supervision." Tex. Code Crim. Proc. art. 11.072, § 2(b). Because Sanchez challenges the validity of the conviction which placed him on community supervision for a 10-year period, we have jurisdiction to review the denial of his habeas application. *See id.* § 8 ("If the application is denied in whole or part, the applicant may appeal under Article 44.02 and Rule 31, Texas Rules of Appellate Procedure.").

- [2] [3] [4] [5] Generally, an appellate court reviews a trial court's decision to grant or deny habeas corpus relief for an abuse of discretion. See Ex parte Zantos-Cuebas, 429 S.W.3d 83, 87 (Tex. App.—Houston [1st Dist.] 2014, no pet.). We view the evidence in the light most favorable to the trial court's ruling. See Kniatt v. State, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). We will uphold the habeas court's judgment as long as it is correct under any theory of law applicable to the case. See Ex parte Taylor, 36 S.W.3d 883, 886 (Tex. Crim. App. 2001) (per curiam). But if, as here, the habeas judge was not the trial judge and there was no evidentiary hearing, the judge is not in an appreciably better position than the reviewing court to resolve the matter. Thus, a de novo review is appropriate. See Ex parte Martin, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999) (the generally applied abuseof-discretion standard is not appropriate "when the decision does not turn on the credibility or demeanor of witnesses").
- [6] [7] We afford deference to the trial court's determination of historical facts supported by the record. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). "However, if the trial court's findings of fact are not supported by the record, then we may reject its findings." *Ex parte White*, 160 S.W.3d 46, 50 (Tex. Crim. App. 2004).

B. The Strickland standard

- *4 To establish that trial counsel rendered ineffective assistance, an appellant must demonstrate, by a preponderance of the evidence, that (1) his counsel's performance was deficient, and (2) there is a reasonable probability that the result of the proceeding would have been different but for his counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ex parte White*, 160 S.W.3d at 52. The appellant's failure to make either of the required showings of deficient performance or sufficient prejudice defeats the claim of ineffective assistance. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) ("An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong.").
- [8] [9] [10] We indulge a presumption that counsel's conduct fell within the range of reasonable professional assistance, and thus, the appellant must overcome the presumption that the challenged action constituted "sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *Williams*, 301 S.W.3d at 687. Our review is highly deferential to counsel, and we do not speculate on counsel's trial strategy.

See Bone v. State, 77 S.W.3d 828, 833, 835 (Tex. Crim. App. 2002). To prevail on an ineffective-assistance claim, the appellant must provide an appellate record that demonstrates that counsel's performance was not based on sound strategy. See Thompson v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (holding that record must affirmatively demonstrate alleged ineffectiveness).

[11] [12] [13] is entitled to reasonably effective assistance of counsel, including investigation of the defendant's case. Strickland, 466 U.S. at 690-91, 104 S.Ct. 2052. Part of the duty to investigate is counsel's responsibility to seek out and interview potential witnesses. Butler v. State, 716 S.W.2d 48, 55 (Tex. Crim. App. 1986). To show ineffective assistance of counsel based on an uncalled witness, an appellant must show two things: (1) the witness would have been available to testify; and (2) the witness's testimony would have been of some benefit to the defense. Everage v. State, 893 S.W.2d 219, 222-23 (Tex. App.—Houston [1st Dist.] 1995, pet. refd). To meet the availability requirement, proposed witnesses must testify or swear in an affidavit that they were available to testify at the defendant's trial. See Ex parte Ramirez, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007).

[15] [16] An ineffectiveness claim based on the failure to call witnesses may be established through either testimony on the record or an affidavit from the uncalled witness. See Ex parte White, 160 S.W.3d at 52 (applicant provided affidavit from uncalled witness). While we defer to any underlying historical fact determinations made by the habeas court, we review the ultimate question of prejudice de novo. See Johnson v. State, 169 S.W.3d 223, 239 (Tex. Crim. App. 2005).

C. Evaluation of the Findings of Fact and Conclusions of Law

In his sole issue, Sanchez claims that the habeas court abused its discretion because he proved that his trial counsel was ineffective by showing that Captain Grassi and Martin were available to testify and would have aided his defense. The State contends that Sanchez's ineffectiveness argument is irrelevant because the witnesses' affidavits did not state that they were available on the date of trial and would have benefited the defense. In any event, the State argues that Sanchez cannot meet either of the *Strickland* prongs because he cannot show that his trial counsel's performance was deficient or that there was a reasonable probability that the jury would have acquitted him had the witnesses testified.

1. Performance prong

*5 For the first *Strickland* prong, performance of counsel, as discussed above, to show ineffectiveness of counsel based on an uncalled witness, an appellant must show two things: (1) the uncalled witness would have been available to testify; and (2) the witness's testimony would have been of some benefit (2) the witness's testimony would have been of some benefit (2) the defense. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Sanchez conceded that Flores's affidavit did not state that he was available to testify, so we only need to analyze the affidavits of Captain Grassi and Martin.

a. Captain Grassi's affidavit

[17] Captain Grassi's affidavit stated that he was a Tomball police captain and that on the date in question, he was riding as a passenger in Sanchez's truck with three other passengers when they observed a high-speed car chase conducted by the Harris County Sheriff's Office. Captain Grassi further stated that he contacted the Tomball Police Department to advise them what he was witnessing, and he told Sanchez to follow the chase. During the chase, an unmarked police vehicle cut directly in front of Sanchez's truck, forcing Sanchez to veer to the left to avoid striking the car, but Captain Grassi stated he was never aware of Sanchez's truck striking that vehicle, and he did not see any visible damage to Sanchez's truck the next day. Captain Grassi concluded that he "was not aware of having collided with the other vehicle," but that Sanchez's "truck is a large, heavy-duty work truck, so it is possible there was a glancing strike to the other vehicle, but nobody in Oscar's vehicle showed any knowledge of having been in a collision[.]"

Sanchez has not shown that Captain Grassi would have been available to testify because his affidavit did not discuss whether he would have. *See Ex parte Ramirez*, 280 S.W.3d at 853. Thus, the Court need not reach the second requirement of whether Captain Grassi's testimony would have been of some benefit to the defense.

b. Martin's affidavit

[18] Martin's affidavit stated that "[o]n the night of August 11, 2013, my husband [B.] Flores, [R.] Grassi and his girlfriend [M.], Oscar Sanchez and me went out for [Grassi]'s birthday ... at a pub playing shuffle board and then decided

to go to Whiskey River." Martin's affidavit continued that, after leaving Whiskey River, "there was a high speed chase on 249 going north" and "Rick asked Oscar to follow the chase while he was on the phone with someone from his police station where he works." Martin's affidavit stated that "I was sitting behind Oscar chatting with [M.] not really paying much attention to the road up ahead but did see a car up ahead on the left side of us," and then "Oscar slams on his brakes and honks his horn, and swerves away from a car." Martin's affidavit concluded that, "I did not observe any collision between Oscar's truck and any car that night," "[i]f we had been in a collision I would have noticed it," and "[i]f I had been asked to testify at Mr. Sanchez's trial, I would have gladly done so."

With this last sentence, Martin represented that she would have been available to testify at Sanchez's trial, satisfying the first prong of the performance inquiry. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. The remaining question is whether Martin's testimony would have been of "some benefit" to the defense.

Given that Sanchez put on no defense and Lieutenant Goudeau could not recall the collision, the jury heard an incomplete story from those closest to the action with the best opportunity to observe it. The State's witnesses testified that Sanchez's passengers' recollection of the accident was "consistent with" the State's theory that Sanchez struck Lieutenant Goudeau's vehicle, but Martin's affidavit conveys the opposite. Martin would have testified that there was no impact that anyone observed, which would have contradicted the State's theory and its characterization of her statement. Her testimony would have bolstered Sanchez's trial theory. See Everage v. State, 893 S.W.2d 219, 222 (Tex. App.— Houston [1st Dist.] 1995, pet. ref'd) (failure to call witness who could have corroborated defendant's testimony that he was not primary actor was ineffective assistance of counsel). Martin's testimony would have been favorable to Sanchez. Accordingly, Sanchez established that at least one witness was available and their testimony would have been of some benefit to the defense, under the first *Strickland* prong.

2. Prejudice

*6 [19] For the second *Strickland* prong, Sanchez needed to show a reasonable probability that the result of the proceeding would have been different, undermining confidence in the outcome of the trial. *Bone*, 77 S.W.3d at 833 (citing *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052).

[20] The elements of the offense of failure to stop and render aid are that the defendant (1) is the driver of a vehicle; (2) involved in an accident; (3) causing injury or death of any person; (4) and the driver intentionally or knowingly; (5) fails to stop and render assistance. *McGuire v. State*, 493 S.W.3d 177, 205 (Tex. App.—Houston [1st Dist.] 2016, pet. refd); Tex. Transp. Code § 550.021(c). Because Sanchez did not contest that he was the driver and he did not stop to assist Lieutenant Goudeau, who was injured, the disputed issues in the case were whether Sanchez was "involved in an accident" and whether he "intentionally or knowingly" failed to stop and render aid.

The evidence against Sanchez was not overwhelming. See Ex parte Ybarra, 629 S.W.2d 943, 952 (Tex. Crim. App. 1982) (en banc) (where the State's evidence is circumstantial and "suggests a number of outstanding reasonable hypotheses besides the guilt of the accused, failure to present any evidence" on the accused's behalf is harmful). Here, the complaining witness could not remember the accident and did not know whether Sanchez knew he had struck her vehicle. Another officer testified to what he saw through his rearview mirror while driving 100 miles an hour away from the accident during a police chase. The physical evidence was weak. There was no sign that the airbags deployed. There was no evidence of anything else that should have alerted Sanchez that his truck had collided with the Impala. Sanchez's large truck had minimal damage. The physical evidence did not exclude sources other than a collision with the Impala for the scuff marks on the bumper and undercarriage, the crack on the grill, the grey paint, and the dark plastic remnant in the tire tread. There was no evidence of Sanchez's state of mind at the time of the accident. Sanchez came forward the day after the accident and cooperated with the investigation. The defense put on no witnesses at all.

Sanchez's defense was that there was no collision or if there was, it was so minor that he was unaware of it. Failure to call a witness to advance these denial and mens rea defenses can be prejudicial. *See Butler v. State*, 716 S.W.2d 48, 54–55 (Tex. Crim. App. 1986) (failure to call alibi witnesses was ineffective assistance of counsel and undermined confidence in the outcome of the trial); *In re I.R.*, 124 S.W.3d 294, 300 (Tex. App.—El Paso 2003, no pet.) ("The failure to interview or call a witness satisfies the prejudice prong if it results in the failure to advance a viable defense."); *Shelton v. State*, 841 S.W.2d 526, 527 (Tex. App.—Fort Worth 1992, no pet.) (failure to call a witness who, if believed, would have contradicted the complainant's version of events so that "it

would have been impossible for the jury to have believed both witnesses" was prejudicial); *State v. Thomas*, 768 S.W.2d 335, 337 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (holding that defendant accused of sexual assault and who admitted having sex with the complainant was prejudiced by trial counsel's deficient performance in failing to call witnesses who would have corroborated his defense of consent). An exculpatory eyewitness whose testimony would corroborate Sanchez's defense that there was no accident likely would have made an impact on the jury. Indeed, the absence of these witnesses was an issue at trial.

*7 In closing argument, the State capitalized on the decision not to call any of Sanchez's passengers that night:

You guys didn't hear from them, but did you need to? They all said the same thing. They were all drunk people in the car with the defendant.

•••

[Sanchez] knew that that crash resulted in large injuries and possibly death, based on the severity of it if he had stopped. So, why wouldn't you want to stop for that? There's going to be a crime maybe. He's got a captain in his car. They're following a chase. That captain's been drinking. He is friends with the defendant. Do you want to get your friend in trouble? Do you want to get in trouble by the Tomball Police Department because you're in the middle of a chase?

In a case that presented two competing versions of events, the jury did not have a chance to hear from and evaluate the credibility of one or more eyewitnesses closest to the accident. Instead, the State dismissed them as "drunk people" and suggested that Grassi was doing something wrong by following a police chase and that his testimony would have only gotten Sanchez in trouble. Had trial counsel called Martin to testify that no collision occurred, there was a reasonable probability of a different result.

3. Trial strategy

[21] [22] Even when an uncalled witness is available and his unoffered testimony would have likely benefitted the defense, it still may be that defense counsel's representation was not deficient. *See Everage*, 893 S.W.2d at 222. This is because there may be reasonable trial strategies that counsel against putting into evidence even helpful testimony. For example, by calling a helpful witness, the defense might open the door to potentially more harmful impeachment. As

another example, if defense counsel knows that a helpful witness plans to lie under oath, it is not deficient performance to decline to call the person to testify.

Here, because the State did not respond to Sanchez's petition with insight into trial counsel's strategy and the habeas court refused an evidentiary hearing, it is simply unknown whether Sanchez could have established deficient performance with no reasonable trial strategy.

4. Trial court's findings of fact and conclusions of law

[23] The habeas court order denying an evidentiary hearing and denying Sanchez's application for habeas relief concluded that Sanchez "fails to show that Grassi, Martin, and Flores were available and that their testimony would have benefited the defense." Although the habeas court's conclusion that Sanchez failed to show that Captain Grassi and Flores were available to testify at Sanchez's trial is supported by the record, the same cannot be said for its finding that Sanchez failed to show that Martin was available. See Ex parte Wheeler, 203 S.W.3d 317, 325–26 (Tex. Crim. App. 2006). Martin stated, "If I had been asked to testify at Mr. Sanchez['s] trial, I would have gladly done so." This is sufficient to show availability. Thus, the habeas court's third conclusion of law, that the "applicant fails to show that ... Martin [was] available," is unsupported by the record. Cf. Miller v. State, 393 S.W.3d 255, 268 (Tex. Crim. App. 2012) (reversing trial court's denial of defendant's motion to suppress because the trial court's legal conclusion that police were legally present in appellant's apartment was unsupported by the record).

*8 Similarly, the habeas court's conclusion that Sanchez "fails to show" that Martin's "testimony would have benefited the defense" is not supported by the record. As discussed above, Martin's testimony as outlined in her sworn statement would have been that there was no collision and that she and the other passengers would have known if there had been. At trial, no witness testified that there was no collision. Martin's live testimony would not have been cumulative because it would have added the detail about there being no collision and would have provided a defense witness for the jury to evaluate for credibility. *See State v. Arizmendi*, 519 S.W.3d 143, 150 (Tex. Crim. App. 2017) (cumulative evidence conveys "the same facts with at least the same degree of credibility").

The only thing the jury heard about Martin's statement that benefitted the defense was a general description that it was "consistent" with Sanchez's version of events. But the jury also heard that the passengers' statements were "consistent" with the State's theory of the case. Specifically, Deputy Musil testified that all four passengers' statements were "consistent with [Musil's] theory of the case." The jury received, at best, mixed messages about whether the passengers' statements aligned with Sanchez or the State. Without knowing exactly what Martin's statement was, it was not terribly probative for the jury to hear that it was "consistent" with two diametrically opposed theories of the case. Martin's affidavit shows that her testimony would have been of "some benefit" to the defense and, looking at the totality of the trial, that there was a reasonable probability that the result of the trial would have been different had she testified about what she saw.

The habeas court erred by concluding that Sanchez failed to show "a reasonable probability that the outcome would have been different had Martin been called to trial." The habeas court did not hear from trial counsel, or receive a response from the State, and it did not conduct an evidentiary hearing. On these facts, without more information from trial counsel about why these witnesses were not called, we cannot conclude that Sanchez received ineffective assistance of counsel because we have no information about trial strategy. See Ex parte Garcia, 353 S.W.3d 785, 789 (Tex. Crim. App. 2011) (habeas relief cannot be granted based only on the applicant's sworn pleadings and instead can be supported by live, sworn testimony); cf. Rylander v. State, 101 S.W.3d 107, 110-11 (Tex. Crim. App. 2003) (en banc) (noting in the direct appeal context that the record is undeveloped where trial counsel has not had a chance to respond to allegations of ineffectiveness and explain any strategic decisions).

[24] The dissent contends that Sanchez's application was properly denied because he did not meet his burden to address trial strategy in support of his ineffective-assistance claim. The dissent would require a habeas applicant to elicit an affidavit from trial counsel admitting deficient performance before the State is compelled to respond or any evidentiary hearing is granted to avoid having a denial of an application insulated from meaningful review. The habeas process does not require so much. Cf. Ex parte Medrano, No. WR-87,182-01, 2018 WL 1161565 at *1 (Tex. Crim. App. Jan. 10, 2018) (noting that court had remanded case for affidavit from trial counsel because findings of fact and conclusions of law were insufficient to address issues raised in habeas application); Ex parte Horton, No. WR-77,149-01, 2013 WL 4830324, at *1-2 (Tex. Crim. App. Sept. 11, 2013) (remanding a third time because findings of fact and conclusions of law were insufficient to address applicant's allegations). Indeed, this is not the first time this Court has

remanded for further proceedings because the habeas court's conclusions could not be reconciled with the allegations in the application, even after a hearing. *See Ex parte Zantos-Cuebas*, 429 S.W.3d 83, 91–92 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

*9 Because the record does not support the habeas court's findings of fact and conclusions of law on performance and prejudice under *Strickland* as to the failure to call Martin, we cannot affirm the denial of habeas relief under Article 11.072. The open question on trial counsel's strategy does not compel a different result.

CONCLUSION

We decline to adopt the trial judge's findings of fact and conclusions of law as written because they are unsupported by the record. We reverse the order of the trial court denying habeas relief and remand for proceedings consistent with this opinion.

En banc reconsideration was requested. Tex. R. App. P. 49.7.

The en banc court consists of Chief Justice Radack and Justices Keyes, Lloyd, Kelly, Goodman, Landau, Hightower, and Countiss.

A majority of the justices of this Court voted in favor of reconsidering the case en banc.

Justice Landau writing for the majority of the en banc court, joined by Justices Kelly, Goodman, Hightower, and Countiss.

Justice Keyes dissenting, joined by Justice Lloyd.

Chief Justice Radack dissenting without opinion.

DISSENTING OPINION ON EN BANC RECONSIDERATION

Evelyn V. Keyes, Justice, dissenting.

This is a simple post-conviction habeas corpus case in which the appellant failed to carry his burden of showing ineffective assistance of counsel in the habeas court. I would affirm the judgment of the habeas court denying the writ. The En Banc Court, however, upends the long-established standard of proof of ineffective assistance and the almost totally deferential standard of review of findings of historical fact by a trial court, substitutes its own new standards, and reviews the historical facts in the record de novo. It then declares it cannot tell whether appellant's counsel was constitutionally ineffective or not, and it remands the case to the habeas court for unspecified "further proceedings." I respectfully dissent.

Oscar Minjare Sanchez Jr. appeals from the denial of his post-conviction application for a writ of habeas corpus filed under Texas Code of Criminal Procedure article 11.072. In his sole issue, Sanchez contends that his trial counsel rendered ineffective assistance by failing to call allegedly exculpatory witnesses who, according to Sanchez, were available to testify during the guilt-innocence phase of his trial for failure to stop and render aid and whose testimony, he claims, would have benefited him.

The original panel opinion in this case, issued December 20, 2018, unanimously affirmed the habeas court's denial of Sanchez's application. The En Banc Court disagrees.² It declares that the habeas court's findings of fact—which simply recite the pleadings filed in that court and historical facts from the record in the trial court—are not supported by the record. It rebalances and reweighs the historical facts in the record from Sanchez's original trial without giving any deference to the original trial court's judgment, its necessarily implied findings of fact, or the habeas court's findings. It declares that it does not have enough evidence to determine whether Sanchez's trial counsel committed ineffective assistance by failing to call witnesses Sanchez claims were available to testify on his behalf and whose testimony Sanchez claims would have benefited him. And it reverses the judgment of the habeas court denying the writ and remands the case to that court for unspecified "proceedings consistent with this opinion."

*10 The en banc opinion thus enshrines in the precedent of this Court errors in the application of both (1) the standard of appellate review of a trial court's findings of historical fact and (2) the standard of proof of constitutionally ineffective assistance of counsel. Because an en banc opinion establishes binding precedent for the Court, I urge review of this case by the Texas Court of Criminal Appeals.³

The historical background facts from the trial record, the habeas court's findings of fact and conclusions of law, and the established standard of proof of ineffective assistance and standard of review of the findings of fact of a habeas court relevant to this case are set out below.

Background

A. Original Trial Proceedings

Sanchez was charged with failing to stop and render aid to Harris County Sheriff's Office Lieutenant Gaisile Goudeau after his truck hit her unmarked police car during a police chase, throwing it over the curb, through some railings, and into a parking lot, causing her severe injuries. The evidence at trial showed that on August 11, 2013, Sanchez was the designated driver for his four passengers on a night out celebrating a friend's birthday. After visiting two bars, where he drank two beers, Sanchez set out on Highway 249 in his F-250 pickup truck to drive Tomball Police Department Captain Richard Grassi, Sharleen Martin, Marion Lamal Oshman, and Bobby Joe Flores home.

At the same time on the same stretch of Highway 249, Lieutenant Goudeau was monitoring a police chase. To allow a police cruiser to pass, Goudeau pulled her unmarked Chevy Impala into the right lane in front of Sanchez's truck. Sanchez swerved to the left to avoid colliding with Goudeau, but his truck struck her Impala from behind, causing the violent crash that lifted Goudeau's car into the air, pushed it over the curb and through some rails, and spun it into the nearby parking lot. Sanchez did not stop. He continued driving his passengers home.

Sergeant K. Benoit, who was following the police chase, testified that he passed Lieutenant Goudeau's car several seconds before the crash, and that he saw in his rearview mirror a truck matching Sanchez's strike Lieutenant Goudeau's car, throwing it into the air, onto the curb, and into the parking lot. Benoit returned to the scene and saw that Goudeau had obvious injuries from the crash. He waited with Goudeau until she was transported to the hospital, where she stayed for four days after suffering severe injuries requiring three surgeries and months of rehabilitation.

*11 Sanchez testified at trial. He admitted that while he was driving home from a bar with friends, he began following the police chase. One of his passengers, Captain Grassi, called the Tomball Police Department to report the chase. Sanchez saw Lieutenant Goudeau's car pull in front of his truck, but

he claimed that he swerved out of the way in time to avoid a collision.

Harris County Sheriff's Office Deputy R. Musil was the lead investigator for the accident and the sole investigator on the crime scene. He took photographs of the scene and analyzed the Impala. He testified that the damage to the Impala was consistent with its having been hit by a larger, higher-sitting vehicle. He also stated that its license plate, found on the highway, had been knocked off by the force of the initial impact from the larger vehicle. Musil also testified that he interviewed the eyewitnesses to the accident, including all four of Sanchez's passengers. Although the interviews were videotaped, the videotapes were not introduced into evidence. On cross-examination by Sanchez's counsel, Deputy Musil stated that the four eyewitnesses' interviews were consistent with each other and that they did not support the police's theory of the case.

Investigator A. Marines of the Harris County District Attorney's Office examined Sanchez's truck. He testified that he found "what [he] believed to be a gray metallic paint which matched the color of the vehicle driven by [Lieutenant Goudeau]" on the truck's front tow ring. He collected samples of the paint and submitted them for testing. Devin Stasicha, a forensic scientist with the Texas Department of Public Safety's Houston Regional Crime Lab, testified that the paint was consistent with paint fragments recovered from the rear bumper of Goudeau's Impala.

Investigator Marines further testified that he spoke with Sanchez and Captain Grassi at the Tomball Police Department the day after the accident. Both were cooperative and spoke with Marines voluntarily. Sanchez told Marines that he had not hit Goudeau's car.

Two days later, Investigator Marines asked Sanchez to return to the Tomball Police Department to make a statement, and Sanchez complied, providing a written statement. On cross-examination, Marines testified that Sanchez's interview and statement were consistent with each other and were also consistent with Grassi's interview.

After eliciting the above-described information about the eyewitnesses' statements on cross-examination of Deputy Musil and Investigator Marines, Sanchez's attorney chose not to call any of Sanchez's passengers as witnesses. Instead, he argued at closing that the State had not called them as

witnesses because their testimony would have conflicted with the State's theory that Sanchez caused the accident.

The jury convicted Sanchez of the third-degree felony offense of failure to stop and render aid. See Sanchez v. State, No. 01-16-00293-CR, 2017 WL 1424949, at *1 (Tex. App.—Houston [1st Dist.] Apr. 20, 2017, pet. ref'd) (mem. op., not designated for publication). The trial court assessed Sanchez's punishment at ten years' confinement but probated this sentence by placing him on community supervision for a period of ten years. See id. Sanchez did not file a motion for new trial. In 2017, this Court affirmed Sanchez's conviction, overruling the two issues he raised on appeal—whether the trial court erred in submitting a voluntary-intoxication charge to the jury and whether the evidence of his knowledge of the accident was insufficient. See id. The Court of Criminal Appeals refused Sanchez's petition for discretionary review and this Court's mandate issued on October 20, 2017.

B. Habeas Corpus Proceedings

*12 On December 12, 2017, Sanchez filed an application for a writ of habeas corpus under Texas Code of Criminal Procedure article 11.072, alleging only that his trial counsel had provided ineffective assistance by failing to call necessary exculpatory witnesses—Captain Grassi, Martin, and Flores—to testify. In support of his application, Sanchez obtained and attached affidavits from each of these three witnesses stating that they were passengers in his truck, they saw him swerve around the car that darted out in front of the truck, and they were not aware of a collision.

The habeas court denied Sanchez's application without an evidentiary hearing and certified that Sanchez had a right of appeal. We abated this appeal and remanded the case to the habeas court for findings of fact and conclusions of law mandated by article 11.072 section 7(a). See Tex. Code Crim. Proc. Ann. art. 11.072, § 7(a) (providing that unless applicant is "manifestly entitled to no relief," habeas court "shall enter a written order including findings of fact and conclusions of law").

The habeas court supplemented the appellate record with its findings of fact and conclusions of law, which included the following:

FINDINGS OF FACT

....

- 4. In his sole ground for relief, the applicant alleges that he received the ineffective assistance of trial counsel. *Applicant's Writ* at 8–9.
- 5. The applicant claims trial counsel failed to present evidence from Captain Richard Grassi, Sharleen Martin, and Bobby Joe Flores during the applicant's trial. *Applicant's Writ* at 8–9.
- 6. The applicant claims that these witnesses would have testified that they were passengers in the applicant's vehicle and that they were not aware of the applicant's vehicle colliding with the complainant's vehicle. *Applicant's Writ* at 8–9.
- 7. The trial court finds that trial counsel did not call any witnesses in his case-in-chief during the guilt[/]innocence phase of the applicant's trial.
- 8. The trial court finds, based on the reporter's record, that trial counsel's cross[-]examination of Deputy Ryan Musil elicited testimony that Grassi, Martin, and Flores all made consistent statements to law enforcement about what happened....
- 9. The trial court finds, based on the reporter's record, that trial counsel's cross[-]examination of Investigator Arturo Marines elicited testimony that the applicant and Grassi both made consistent statements to law enforcement about what happened.
- 10. The trial court finds, based on the reporter's record, that during closing trial counsel made the following argument: that "[t]here are four eyewitnesses in a car, Bobby Joe Flores, [Sharleen] Nichol Martin, Maria Lamal Oshman, Captain Rick Grassi ... [the prosecutor] didn't call them"; that the prosecutor failed to bring the jury "every piece of evidence" as she had promised; and that the prosecutor failed to do so because "it [did not] match her theory."
- 11. The trial court finds that the applicant fails to show that trial counsel was deficient.
- 12. The trial court finds that the applicant fails to establish a reasonable probability that the result of the proceeding would have been different had these witnesses been called to testify at the applicant's trial.

CONCLUSIONS OF LAW

....

3. The applicant fails to show that Grassi, Martin, and Flores were available and that their testimony would have benefited the defense. *See King v. State*, 649 S.W.2d 42 (Tex. Crim. App. 1983); *[E]x parte Flores*, 387 S.W.3d 626, 638 (Tex. Crim. App. 2012) (the applicant must still show that "some benefit" establishes a reasonable probability that the result of the proceeding would have been different, i.e., one sufficient to undermine confidence in the outcome).

....

*13 5. In all things, the applicant has failed to demonstrate that he was denied the effective assistance of counsel.

Accordingly, the instant application is **DENIED**.

After this Court reinstated the case and requested briefing, both Sanchez and the State filed briefs and Sanchez filed a reply. See Tex. R. App. P. 31.1. The Court issued its opinion on December 18, 2018, affirming the habeas court's denial of the writ. Sanchez's motion for rehearing was denied by operation of law as two of the original panel members were no longer on the Court. See note 2 supra. The En Banc Court granted rehearing, withdrew the original opinion, vacated the judgment, and now issues its opinion. I dissent.

Ineffective Assistance of Counsel

In his sole issue, Sanchez claims that the habeas court abused its discretion in concluding that he failed to show that his trial counsel was constitutionally ineffective. He contends that he showed that Captain Grassi and Sharleen Martin were available to testify, that their testimony would have benefited his defense, 5 and that, because they were not called as witnesses, his counsel's performance was deficient and probably caused a different result than would have been the case had they been called.

A. Standard of Review in Habeas Corpus Proceedings

Appellate courts review a trial court's decision to grant or deny habeas corpus relief for an abuse of discretion. *See Exparte Montano*, 451 S.W.3d 874, 877 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). "In reviewing the trial court's

decision to grant or deny habeas corpus relief, we view the evidence in the light most favorable to the trial court's ruling." Id. We afford almost total deference to the trial court's determination of historical facts supported by the record, especially when the fact findings are based upon an evaluation of credibility and demeanor. Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997); Montano, 451 S.W.3d at 877. And we afford the same amount of deference to the trial court's rulings on the application of law to fact if the resolution of ultimate questions turns on an evaluation of the witnesses' credibility and demeanor. Guzman, 955 S.W.2d at 89; Sandifer v. State, 233 S.W.3d 1, 2 (Tex. App.—Houston [1st Dist.] 2007, no pet.). When an issue is necessarily fact intensive, "a trial court's finding must be accepted on appeal unless it is clearly erroneous." Montano, 451 S.W.3d at 877. And "[w]hen there are no written findings explaining the factual basis for the trial court's ruling, we imply findings of fact that support the ruling so long as the evidence supports those implied findings." Id.

Appellate courts review the evidence presented in the light most favorable to the trial court's ruling, regardless of whether the court's findings are implied or explicit, or are based on affidavits or live testimony, provided they are supported by the record. See Ex parte Wheeler, 203 S.W.3d 317, 325–26 (Tex. Crim. App. 2006); Ex parte Murillo, 389 S.W.3d 922, 926 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Appellate courts may treat findings mislabeled as conclusions of law as findings of fact. See Ex parte Estrada, 573 S.W.3d 884, 891 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (citing Ray v. Farmers' State Bank of Hart, 576 S.W.2d 607, 608 n.1 (Tex. 1979)). We will uphold the habeas court's judgment so long as it is correct under any theory of law applicable to the case. See Ex parte Taylor, 36 S.W.3d 883, 886 (Tex. Crim. App. 2001) (per curiam).

*14 Here, the en banc opinion sets out the general standard of review in habeas proceedings. Slip Op. at 7–8. But it understates the Court of Criminal Appeals' long-standing holding that the intermediate appellate courts should afford "almost total deference" to the trial court's determination of historical facts and to the trial court's rulings on ultimate questions that turn on an evaluation of witnesses' credibility and demeanor. See Ex parte Guzman, 955 S.W.2d at 89; Ex parte Montano, 451 S.W.3d at 877. And it misjudges who the finder of historical fact is in this post-conviction habeas corpus proceeding based on ineffective assistance at trial—namely, the original trial court in which Sanchez's counsel represented him, not the habeas court, whose findings merely

reflect the trial record and Sanchez's pleadings in his habeas petition. Accordingly, stating that the habeas court was in no better position than this appellate court to determine the relevant historical facts, as the habeas judge was not the original trial judge, the En Banc Court deems itself free to review and reweigh de novo the historical facts relevant to Sanchez's trial counsel's representation of him. It does not defer at all to the original trial court's judgment on the verdict or the necessarily implied findings of historical fact by the jury that evaluated the demeanor and credibility of the witnesses at trial that support the judgment. It likewise affords no deference to the habeas court's findings of historical fact. It concludes that they are unsupported by the record, even though they merely recite the relevant historical facts from the trial record and set forth Sanchez's claims in his application for habeas corpus. Yet, prevailing standards of review require that the historical facts the jury found by evaluating the demeanor and credibility of the witnesses at trial and the habeas judge found by reading the record and acknowledging its contents and Sanchez's pleadings must be afforded almost total deference by the appellate court, not decided anew, as the En Banc Court does. See, e.g., Guzman, 955 S.W.2d at 89.

The real question in this ineffective assistance of counsel inquiry is threefold: whether, taking the historical facts as established by the trial record and according those facts almost total deference, and viewing the record in the light most favorable to the trial court's and the habeas court's judgments, Sanchez established (1) that the witnesses he claims were necessary to his defense were available to testify at trial, (2) that their testimony would have benefited his defense, *and* (3) that no reasonable attorney could have employed a strategy under which they were *not* called, the questions to which I now turn.

B. Standard of Proof of Ineffective Assistance

To establish that trial counsel rendered constitutionally ineffective assistance, an appellant must demonstrate, by a preponderance of the evidence, that (1) his counsel's performance was deficient and (2) there is a reasonable probability that the result of the proceeding would have been different but for his counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ex parte White*, 160 S.W.3d 46, 51 (Tex. Crim. App. 2004); *see also Robinson v. State*, 514 S.W.3d 816, 823 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). The appellant's failure to make either of the required showings of deficient performance or sufficient prejudice

defeats the claim of ineffective assistance. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) ("An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong.").

Courts indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and, therefore, the appellant must overcome the presumption that the challenged action constituted "sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *Williams*, 301 S.W.3d at 687; *see also Robinson*, 514 S.W.3d at 823. Appellate review is highly deferential to counsel, and courts do not speculate regarding counsel's trial strategy. *See Bone v. State*, 77 S.W.3d 828, 833, 835 (Tex. Crim. App. 2002).

To prevail on an ineffective assistance claim, the appellant must provide an appellate record that affirmatively demonstrates that his counsel's performance was not based on sound strategy. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (holding that record must affirmatively demonstrate alleged ineffectiveness). In the absence of evidence of counsel's reasons for the challenged conduct, courts will assume a strategic motivation if any can possibly be imagined and will not conclude that the challenged conduct constitutes deficient performance unless it was so outrageous that no competent attorney would have engaged in it. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

C. Application of the Standard of Proof

1. Performance Prong

With respect to the first *Strickland* prong, performance of counsel, to demonstrate ineffectiveness of counsel based on an uncalled witness, an appellant must show two things: (1) the witness would have been available to testify; and (2) the witness's testimony would have been of some benefit to the defense. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *Ex parte Ramirez*, 280 S.W.3d 848, 853–54 (Tex. Crim. App. 2007) (per curiam) (denying habeas relief based on argument that trial counsel was ineffective for failing to call witnesses where witness's statement was "not sworn or signed" and did "not state that she was available to testify at [defendant's] trial"); *White*, 160 S.W.3d at 52; *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983); *Robinson*, 514 S.W.3d at 824. This may be established through either testimony on the record or, as here, affidavits from the uncalled witnesses; mere

allegations in a motion or habeas petition are not sufficient to establish these factors. *See White*, 160 S.W.3d at 52–53 (rejecting ineffectiveness claim where applicant provided affidavit from uncalled witness but did not provide substance of testimony that showed benefit to applicant); *Robinson*, 514 S.W.3d at 824 (rejecting ineffectiveness claim where appellate counsel obtained letters from proposed witnesses but letters neither indicated their availability or willingness to testify at appellant's trial nor described substance of testimony had they been asked to testify).

*15 Where the record is silent as to trial counsel's rationale in deciding not to call witnesses, we are directed to assume a strategic motivation if any can possibly be imagined, and only if none can be conceived may we conclude that the challenged conduct constitutes deficient performance. *See Exparte Varelas*, 45 S.W.3d 627, 632 (Tex. Crim. App. 2001); *Garcia*, 57 S.W.3d at 440. This is particularly uncontroversial, as "[t]he decision whether to call a witness is clearly trial strategy and, as such, is a prerogative of trial counsel." *Brown v. State*, 866 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

Like the habeas trial court, I would hold that Sanchez failed to make the required showing "that Grassi, Martin, and Flores were available and that their testimony would have benefited the defense." I would also hold that Sanchez failed to show that his trial counsel could have had no conceivable strategic motivation for failing to call Grassi and Martin; and, therefore, he failed to defeat the presumption that his trial counsel did not provide ineffective assistance.

a. Availability of the witnesses to testify

A defendant who complains that his attorney was ineffective because he failed to call certain witnesses whose testimony would have benefited him must show that the uncalled witnesses were available to testify at his trial. *See Ramirez*, 280 S.W.3d at 853 (denying habeas relief based on ineffective assistance for failure to call witness whose statement did "not state that she was available to testify at [defendant's] trial"); *White*, 160 S.W.3d at 52; *King*, 649 S.W.2d at 44. Courts must afford almost total deference to the habeas court's findings that a habeas applicant, such as Sanchez, did not show by a preponderance of the evidence that the uncalled witnesses he seeks—here, Captain Grassi and Martin—were available to testify at his trial, as long as the habeas court's findings are

supported by the record. *See Wheeler*, 203 S.W.3d at 325–26. And they are.

Here, the record relied on by the habeas court included the reporter's record from trial and the affidavits of Captain Grassi and Martin. Captain Grassi's affidavit did not state anything about his availability to testify at Sanchez's trial. Martin's affidavit stated, "If I had been asked to testify at Mr. Sanchez's trial, I would have gladly done so." I would conclude, therefore, that the habeas court did not abuse its discretion in finding that Sanchez failed to show that Captain Grassi was available to testify at Sanchez's trial. See Ramirez, 280 S.W.3d at 853; White, 160 S.W.3d at 52; King, 649 S.W.2d at 44; Robinson, 514 S.W.3d at 824. Assuming without deciding that Martin's affidavit was sufficient to show her availability to testify, despite the habeas court's finding, and even assuming the same with respect to Captain Grassi, I would still conclude that Sanchez failed to show that the testimony of either Grassi or Martin would have benefited him, as is also required.

b. Benefit of Grassi's and Martin's testimony

Even if Sanchez had shown that Captain Grassi and Martin were available to testify at his trial, in order to establish that his trial counsel was ineffective he still needed to show that he would have benefited from their testimony to satisfy the first prong of *Strickland*, requiring that the defendant show his counsel's performance was professionally deficient. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052; *Ramirez*, 280 S.W.3d at 853. The habeas court found that Sanchez did not make that showing with respect to either witness. I agree.

The habeas court found that Sanchez's trial counsel elicited testimony on cross-examination of Deputy Musil and Investigator Marines that Captain Grassi, Martin, and Sanchez all made consistent statements to law enforcement about the accident, and then used this information in his closing argument as evidence that Sanchez did not hit Lieutenant Goudeau's car. That court also found that Sanchez's trial counsel argued that the prosecutor failed to bring Grassi's and Martin's testimony before the jury, despite promising to bring all evidence before them, and that the prosecutor did so because it did not match her theory.

*16 Specifically, the habeas court found that

during closing trial counsel made the following argument: that "[t]here are four eyewitnesses in a car, Bobby Joe

Flores, [Sharleen] Nichol Martin, Maria Lamal Oshman, Captain Rick Grassi ... [the prosecutor] didn't call them;" that the prosecutor failed to bring the jury "every piece of evidence" as she had promised; and that the prosecutor failed to do so because "it [did not] match her theory."

This Court must afford total deference to these findings unless they are not supported by the record. *See Wheeler*, 203 S.W.3d at 325–26. Here, the historical facts found by the habeas court and necessarily implied by the jury's verdict and the original trial court's judgment are fully supported by the record.

In his affidavit submitted with Sanchez's habeas petition, Captain Grassi stated that on August 11, 2013, he was riding as a passenger in Sanchez's truck with three other passengers when they observed a high-speed car chase conducted by the Harris County Sheriff's Office. Grassi contacted the Tomball Police Department—his employer—to report the chase and told Sanchez to follow it. An unmarked police car then cut directly in front of Sanchez's truck, forcing Sanchez to veer to the left to avoid striking the car. While Grassi "was not aware of having collided with the other vehicle," and did not see any visible damage to Sanchez's truck the next day, he concluded that Sanchez's "truck is a large, heavy-duty work truck, so it is possible there was a glancing strike to the other vehicle, but nobody in [Sanchez]'s vehicle showed any knowledge of having been in a collision[.]"

Martin's affidavit stated that "[o]n the night of August 11, 2013, my husband Bobby Flores, Rick Grassi and his girlfriend Mariam, Oscar Sanchez and [I] went out for Rick's birthday ... at a pub playing shuffle board and then decided to go to Whiskey River." After leaving Whiskey River, "there was a high-speed chase on 249 going north" and "[Captain Grassi] asked [Sanchez] to follow the chase while he was on the phone with someone from his police station where he works." Martin's affidavit continued, "I was sitting behind [Sanchez] chatting with [Oshman] not really paying much attention to the road up ahead but did see a car up ahead on the left side of us," and then "[Sanchez] slams on his brakes and honks his horn, and swerves away from a car." Martin's affidavit concluded, "I did not observe any collision between [Sanchez]'s truck and any car that night," and she averred that "[i]f we had been in a collision I would have noticed it."

While it is possible that the testimony these witnesses stated they would have provided may have had some benefit to Sanchez's defense, it is also equally possible, if not more likely than not, that calling Captain Grassi and Martin to testify would have harmed Sanchez's defense since it would have exposed them to cross-examination. It is undisputed that Sanchez was driving these witnesses home at night after they had visited two bars. On cross-examination, their testimony, demeanor, and credibility would have had to have been weighed against the testimony, demeanor, and credibility of Sergeant Benoit, who was following the police chase and saw and heard the accident, and the two investigating officers who gave evidence regarding the details of the accident and who took videotaped interviews of these witnesses and testified on the stand that they corroborated Sanchez's testimony but who were not asked further details. See Castruita v. State, No. 03-10-00419-CR, 2012 WL 2981105, at *3 (Tex. App. -Austin July 12, 2012, no pet.) (mem. op., not designated for publication) (testimony that "may have had some benefit" to defendant's defense was not shown to be beneficial where it was "also possible that the testimony would have harmed [defendant's] appellant's defense during cross-examination").

*17 Based on its review of the facts from the trial records, the habeas court came to the conclusion that Sanchez failed to show that Grassi's and Martin's testimony would have benefited Sanchez. See Ex parte Flores, 387 S.W.3d 626, 638 (Tex. Crim. App. 2012) ("[T]he applicant must still show that 'some benefit' establishes a reasonable probability that the result of the proceeding would have been different, i.e., one sufficient to undermine confidence in the outcome."). I agree.

Having concluded that Sanchez had failed to carry his burden of showing that the witnesses were available and that their testimony would have benefitted him, the habeas court did not reach the question whether any competent attorney could have failed to call these witnesses. I address it below.

c. Counsel's trial strategy

As stated above, when, as here, the record is silent as to trial counsel's rationale in deciding not to call certain witnesses, we must assume a strategic motivation if any can possibly be imagined, and only if none can be conceived may we conclude that the challenged conduct constitutes deficient performance. *See Varelas*, 45 S.W.3d at 632. This is particularly uncontroversial here, as "[t]he decision whether to call a witness is clearly trial strategy and, as such, is a prerogative of trial counsel." *Brown*, 866 S.W.2d at 678. And it is not difficult to imagine a sound trial strategy here, where defense counsel's decision allowed him to advance his client's interests while avoiding prejudicing him.

The evidence that Captain Grassi's and Martin's affidavits stated they would have given—that neither was aware that Sanchez had hit Lieutenant Goudeau's car—was elicited on cross-examination of Deputy Musil and Inspector Marines, after which Sanchez's counsel asked no further questions. This enabled the defense to avoid subjecting Martin and Grassi to cross-examination while introducing evidence supporting Sanchez's testimony that he was unaware that there had been a collision. Cross-examination of these witnesses-Sanchez's friends, with whom he had been out at bars drinking just before the accident—might have shown intoxication or bias on the part of these witnesses, and it would have subjected their credibility to the scrutiny of the jury both through their demeanor on the witness stand and through the introduction into evidence of the videotapes of their interviews with Deputy Musil and through questioning of these witnesses as to their impaired state on the night of the accident.

The only reasonable inference from defense counsel's failure to call Martin and Grassi to the stand is that counsel made a professional judgment that calling these witnesses and opening the door to the videotapes of their interviews would have harmed Sanchez more than it would have benefited him. As it was, defense counsel was able to make the jury aware of their statements and their consistency with Sanchez's account of the accident and to bring that information again to the jury's attention in closing argument, to the benefit of his client, without prejudicing his defense by opening the door to their cross-examination and the introduction of contravening evidence.

Moreover, Sanchez failed to explain how Captain Grassi's and Martin's testimony agreeing with him that they were unaware a collision had occurred would have benefited him, given both the overwhelming evidence of his guilt presented at trial and the risks presented by exposing these potential witnesses to cross-examination and to the introduction of the police videos of their statements, which Sanchez could have introduced into evidence himself had he thought them beneficial. Nor has Sanchez shown that it was not sound trial strategy for defense counsel to elicit testimony from the State's witnesses that these potential witnesses corroborated Sanchez's testimony while at the same time avoiding cross-examination and preserving the right to present the references to their testimony in a light favorable to Sanchez in closing argument.

*18 I cannot rationally conclude that Sanchez has overcome the presumption that his trial counsel's decision not to call Martin and Captain Grassi to testify at trial constituted "sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *Williams*, 301 S.W.3d at 687. I would hold, therefore, that Sanchez did not meet his burden to prove by a preponderance of the evidence that his trial counsel was deficient. *See Thompson*, 9 S.W.3d at 813 (defendant bears burden of proof on both *Strickland* prongs, and failure to make either showing by a preponderance of the evidence defeats ineffectiveness claim); *Toledo v. State*, 519 S.W.3d 273, 287 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (same). Accordingly, I would affirm the judgment of the habeas court denying the writ.

The En Banc Court, however, does not even address this element of the proof of constitutionally deficient representation before coming to the conclusion that it cannot determine whether Sanchez's trial counsel was ineffective or not and, therefore, that it must remand the case to the habeas court for unspecified further proceedings in accordance with its opinion.

2. Prejudice Prong

The "appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong."

Williams, 301 S.W.3d at 687. Thus, because Sanchez failed to demonstrate that his trial counsel's performance was deficient, it is unnecessary to consider whether he was prejudiced by his counsel's performance at trial.

I would overrule Sanchez's sole issue.

Conclusion

I would affirm the judgment of the trial court denying habeas relief. Because the en banc opinion is binding precedent on this Court and because, in my view, the en banc opinion contains fundamental errors of law with respect both to the standard of review of a habeas court's denial of a post-conviction petition for habeas corpus and to the standard of proof of ineffective assistance of counsel and remands this case for further proceedings without any basis in law, I also urge the Court of Criminal Appeals to grant review, to reverse the judgment of the En Banc Court, and to reaffirm the almost totally deferential standard of review of a habeas court's and a trial court's findings of historical fact and the established standard of proof of ineffective assistance of counsel.

All Citations

--- S.W.3d ----, 2020 WL 1522817

Footnotes

- The underlying facts are more fully set forth in this Court's opinion affirming Sanchez's conviction. See Sanchez v. State, No. 01-16-00293-CR, 2017 WL 1424949, at *1–2 (Tex. App.—Houston [1st Dist.] Apr. 20, 2017, pet. ref'd) (mem. op., not designated for publication).
- 1 See Tex. Code Crim. Proc. Ann. art. 11.072, § 2(b).
- Sanchez moved for rehearing and en banc reconsideration of the Court's December 20, 2018 memorandum opinion and judgment in this case. *Ex parte Sanchez*, No. **01-18-00139-CR**, 2018 WL 6684863 (Tex. App.—Houston [1st Dist.] Dec. 20, 2018, no pet. h.) (mem. op., not designated for publication). Because two of the three members of the original panel were no longer on the Court, the motion for rehearing was overruled by operation of law pursuant to Texas Rule of Appellate Procedure 49.3. En banc reconsideration was then granted, the memorandum opinion was withdrawn, and the judgment was vacated. See Tex. R. App. P. 49.7.
- The en banc opinion satisfies the requirements for discretionary review set out in Texas Rule of Appellate Procedure 66.3, subsections (a), (c), (e), and (f). See Tex. R. App. P. 66.3 (listing considerations of Court of Criminal Appeals in deciding whether to grant discretionary review, including whether court of appeals' decision conflicts with another court of appeals decision on same issue; whether court of appeals has decided important issue of state or federal law in way that conflicts with applicable decisions of Court of Criminal Appeals; whether justices of court of appeals have disagreed on material question of law necessary to decision; and whether court of appeals "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of the Court of Criminal Appeals' power of supervision").
- The following facts are as stated in this Court's prior opinion on direct appeal. See Sanchez v. State, No. 01-16-00293-CR, 2017 WL 1424949, at *1-2 (Tex. App.—Houston [1st Dist.] Apr. 20, 2017, pet. ref'd) (mem. op., not designated for publication).

On rehearing, Sanchez concedes that Flores's affidavit did not state that he was available to testify, so we need to analyze only the affidavits of Sharleen Martin and Captain Grassi.

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